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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SHAWN SHAW, Defendant and Appellant.	B213009 (Los Angeles County Super. Ct. No. BA320662)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara R. Johnson, Judge. Affirmed.

Shawn Shaw, in pro. per.; Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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INTRODUCTION

Shawn Shaw appeals his rape and robbery convictions. His appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, raising no issues. After Shaw was notified, he submitted a supplemental brief challenging the sufficiency of the evidence, the admission of photographic and DNA evidence, and the effectiveness of trial and appellate counsel. We have reviewed the entire record and find no merit in Shaw's contentions. Finding no other arguable issues, we affirm the judgment.

BACKGROUND

Appellant was charged by information alleging in count 1 that appellant committed forcible rape in the course of a burglary within the meaning of Penal Code section 667.61, subdivision (b).[1] It was further alleged that he personally used a handgun in the commission of the crime, within the meaning of Penal Code sections 667.61, subdivision (b), and 12022.53, subdivision (b).[2] Count 2 alleged second degree robbery with personal use of a firearm pursuant to Penal Code section 12022.53, subdivision (b). Count 3 alleged the second degree robbery of a second victim, also with a firearm enhancement pursuant to Penal Code section 12022.53, subdivision (b). The information alleged that appellant was a minor over the age of 16, but that allegation was later stricken when the court learned that appellant was not a minor at the time of the crimes. The court also dismissed count 3 and the burglary allegation from count 1.

Prior to trial, defense counsel sought leave to submit a medical report regarding appellant's possible developmental disability. The court suspended the proceedings and granted the prosecution's request to have appellant evaluated by a psychologist of its choice. The issue was ultimately submitted for decision on the reports of three experts.

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[1] Penal Code section 667.61, subdivision (b), enhances a sentence to 15 years to life when a deadly weapon or firearm was used in the commission of a rape, or when the crime is committed in the course of a burglary.

[2] Penal Code Section 12022.53, subdivision (b), adds 10 years to a sentence when a firearm was used in the commission of a rape.

The court found by a preponderance of the evidence that the defense had not shown that appellant was incompetent to stand trial, and reinstituted the proceedings.

At trial, F.R. testified that she was working alone in her store on July 22, 2004. At approximately 2:30 p.m., just one customer, Consuela, was in the store, when two African-American men entered together. F.R. identified appellant in court as one of the men. Appellant brandished a handgun as soon as he entered the store. The other man approached Consuela and grabbed her by the chains she was wearing. Appellant came up behind F.R. where she stood at the cash register, hit her on the head with the gun, and said, "Give me the money, give me the money."

When F.R. opened the register, appellant hit her on the head and legs, pushed her over so that she was bent forward onto some soda boxes, saying "Let me do it" as she said "No." He told her he would kill her if she moved and held the gun to the back of her head. F.R. attempted to stand upright, but appellant prevented her doing so. Appellant raped her, penetrating her vagina with his penis for several minutes until he ejaculated. Appellant then took all the money from the cash register and left. Asked whether she was afraid, F.R. testified that she felt "complete death."

F.R. called 911 and both she and Consuela spoke to the operator. The 911 tape was played after the court admonished the jury that only F.R.'s statements were offered for the truth.[3] F.R. spoke in Spanish on the tape, and a transcript with translation was admitted into evidence. She tearfully told the 911 operator that he had been robbed by two Black gangsters and that one of them raped her. She gave the operator the address, and after answering more questions, she gave the telephone to Consuela.

At trial, F.R. identified her voice on the tape and testified that she had initiated the call and then handed the telephone to Consuela. When the police came, F.R. told them what happened. She was taken the hospital where a nurse examined her and took pictures

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[3] Although defense counsel did not object to the playing of the tape, the prosecutor explained in a sidebar discussion that she was offering F.R.'s words for their truth as an excited utterance hearsay exception.

and swabs.[4] Later, she helped the police artist to create a composite sketch depicting the person who had assaulted her.

In November 2006, Detective Martee Miyakawa showed F.R. a six-person photographic lineup.[5] When F.R. was unable to pick anyone out of the lineup she wrote on the exhibit that she did not remember because of the long time that had passed -- more than two years -- but that she did remember that he was young and did not have a beard.[6] F.R. testified that she had no doubt about her in-court identification. She also identified him in court at the preliminary hearing.

Over a defense relevance objection, the court permitted F.R. to testify that she let the market go because she was too frightened to go there. Patricia Beitel, a nurse practitioner specializing women's health, testified regarding her qualifications to perform a forensic examination and prepare a sexual assault response team (SART) kit. Beitel examined F.R., who was quiet but crying throughout the exam. Beitel observed redness and tenderness in the genital area and on F.R.'s thighs, redness on the back of her neck, a scrape on her lower leg, and tenderness in the vaginal area. Beitel took two vaginal swabs, two cervical swabs, and swabs from the inner thighs. She packaged them and placed them into the SART kit according to standard procedures. She sealed the kit and turned it over to Officer Manuel Sierra. Officer Sierra booked the kit into evidence, marked with the "D.R." No. 04-1818190, in the refrigerated property room.

Jennifer Butterworth, a criminalist with the Los Angeles Police Department Crime Lab, testified regarding her qualifications and stated that she requested the still-sealed SART kit No. 04-1818190 from the property room. It was brought to her by Property

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4 The officer who responded and took F.R. to the hospital was Manuel Sierra. He testified that F.R. was in a state of shock when he arrived at the store at approximately 3:00 p.m.

5 Detective Miyakawa testified that appellant's photograph was in position No. 2.

6 When asked to read her comments aloud, F.R. mistakenly said that the suspect did not have a beard. After further questioning, she corrected herself.

Officer Boba, whose signature appears in Butterworth's lab notes. Butterworth extracted spermatozoa from swabs within the kit, placed the extracted material into a separate envelope, returned the kit to the property room, and requested DNA analysis.

With regard to the effect of temperature on samples, Butterworth testified that she would not expect degradation to any significant degree had the samples been stored at room temperature between July 22, 2004, the date of the crime, and September 17, 2004, the date of her examination.

Los Angeles Police Department criminalist Susan Rinehart testified regarding her qualifications to analyze DNA. Rinehart then testified that she determined a DNA profile by using the type of DNA testing known as short tandem repeat (STR) testing. She created a DNA profile from the samples taken from the swabs and entered it into CODIS (Combined DNA Index System), a convicted felon DNA database maintained by the California Department of Justice.[7] On October 20, 2006, she was notified of a match on CODIS, which identified appellant. Rinehart obtained an additional sample from appellant to confirm the match. Using FBI software, she calculated the percentage of likely matches in the world population and concluded that the profile created from appellant's sample would occur in approximately one in 10 quadrillion individuals.

Rinehart testified that the raw data used for the analysis was not stored properly in the computer and was lost. The final data are still available however, and the original swabs have been preserved and are available for testing.

Detective Martee Miyakawa testified that the case had been assigned to her as a "cold hit" when CODIS notified the Police Department that it had found a DNA match. She obtained a photograph of appellant, placed it in position No. 2 in a six-person photographic lineup, and showed it to F.R. F.R. was not able to make an identification. Detective Miyakawa testified that she personally obtained a swab from appellant and

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[7] Counsel stipulated that appellant's DNA was originally place in CODIS due to a felony appellant committed after the offenses in this case and that the felony did not involve a sexual assault.

booked it into evidence with a request for DNA comparison. She identified appellant in court as the person from whom she took the swab.

When she was assigned the case, Detective Miyakawa noted that four fingerprints had been lifted from the store shortly after the incident. They were not "AFIS quality" meaning they were insufficient for comparison at the time. She had the prints compared to appellant's prints but they were not his. Miyakawa also had some items of clothing analyzed, but no evidence was recovered from them.

The defense presented no evidence.

The jury found appellant guilty of counts 1 and 2 and found true the allegations that he had personally used a firearm in the commission of the crimes. On December 11, 2008, the court sentenced appellant to a total of 28 years to life in prison. The sentence consisted of 15 years to life on count 1, the middle term of 3 years as to count 2, and a 10-year enhancement as to count 2 for the use of a firearm, with the sentence as to count 2 to run consecutively to the term imposed as to count 1. In addition to fines mandated by law, the court ordered appellant to pay victim restitution in the sum of $2,340 after hearing F.R.'s testimony regarding her losses. Appellant filed a timely notice of appeal.

DISCUSSION

1. *Photographic Lineup*

Appellant contends that there was no foundation justifying the admission of the photographic lineup, that he was entitled to be represented by counsel at the photographic lineup, and that the lineup was unduly suggestive. Because there was no objection to the evidence on these or any other grounds, appellant's challenge is not cognizable on appeal. (See Evid. Code, § 353, subd. (a).)

2. *Effective Assistance of Trial Counsel*

Appellant asserts ineffective assistance of trial and appellate counsel. A defendant who claims ineffective assistance of counsel must show that counsel's performance was deficient and that he was prejudiced by counsel's errors. (*Strickland v. Washington*

(1984) 466 U.S. 668, 687-688 (*Strickland*).) Harmless error does not support a claim of ineffective assistance of counsel. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Because appellant makes no prejudice argument, he has not met his burden to establish ineffective assistance of counsel. Nevertheless we make several observations regarding appellant's contentions.

First, appellant contends that trial counsel was ineffective because he did not object to the admission of the photographic lineup into evidence. Because the victim did not recognize appellant's photograph, the lineup could not have affected the judgment. Thus it presents no ground for reversal. (*Strickland*, *supra*, 466 U.S. at p. 690.)

Appellant next contends that defense counsel was ineffective due to his failure to object to the "initial installment" of appellant's DNA sample and fingerprints taken in 2003 pursuant to Penal Code section 295, when the juvenile court sustained a Welfare and Institutions Code section 602 petition based on appellant's violation of Vehicle Code section 10851, subdivision (a), vehicle theft. Appellant contends that the procedures under Penal Code section 295 were arbitrary. The time to object on this ground was in 2003 when the order was made to take the samples. Because it was too late to do so at trial in this case (see *People v. McCray* (2006) 144 Cal.App.4th 258, 263), any objection most certainly would have been overruled. Thus counsel's failure to object on this ground did not render his assistance ineffective. (See *People v. Huggins* (2006) 38 Cal.4th 175, 252-253.)

Appellant contends that counsel was ineffective because of his failure to object to the testimony of the two criminalists under *People v. Kelly* (1976) 17 Cal.3d 24, in which the California Supreme Court set forth the criteria required to determine the reliability of a new scientific technique. (*Id.* at p. 30.)[8] A scientific technique is considered established and reliable once a published appellate decision has affirmed a judgment in a

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[8] The three criteria are the following: "(1) the technique or method is sufficiently established to have gained general acceptance in its field; (2) testimony with respect to the technique and its application is offered by a properly qualified expert; and (3) correct scientific procedures have been used in the particular case. [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 242; *People v. Kelly*, *supra*, 17 Cal.3d at p. 30.)

trial where the technique was admitted. (*Id*. at p. 32; see also *People v. Doolin* (2009) 45 Cal.4th 390, 447.) Here, DNA Analyst Rinehart used STR testing. Since the use of the STR test was affirmed in *People v. Allen* (1999) 72 Cal.App.4th 1093, 1099-1100, there was no need to determine the reliability of the STR test under the *Kelly* criteria. (*Kelly*, at p. 32.) Any objection would most certainly have been overruled, and counsel was not ineffective for failing to make one. (See *People v. Huggins*, *supra*, 38 Cal.4th at pp. 252-253.)

Appellant also suggests that counsel should have objected to the search warrant obtained by Detective Miyakawa because testimony regarding the chain of custody of the 2003 profile was insufficient.[9] Appellant does not explain how the evidence was deficient or how its alleged deficiency affected the basis for the search warrant, and the record on appeal does not reveal why counsel did not object. We thus presume that counsel acted in furtherance of sound trial strategy in not objecting to the warrant. (See *People v. Gray* (2005) 37 Cal.4th 168, 206-207.)

Appellant also claims that his appellate counsel was ineffective because 285 pages are missing from the appellate transcripts. The missing pages correspond to the voir dire examination, which was reported but not included in the reporter's transcript. The normal record on appeal does not include the voir dire examination. (Cal. Rules of Court, rule 8.320(c)(3).) Appellant could have moved to augment the record upon showing "with some certainty how [the requested pages] may be useful to him on appeal." (*People v. Hill* (1967) 67 Cal.2d 105, 124.) He did not do so and has not identified any issue relating to jury selection.[10] Because it was unnecessary for his appellate counsel to

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[9] Counsel stipulated that appellant's DNA was put into CODIS upon conviction of a felony that was not a sexual assault. Evidence of chain of custody is generally not required where the CODIS alert is used only for further investigation, not as evidence of guilt. (See *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1151 & fn. 17.)

[10] The only juror-related incident appearing in the appellate record occurred after testimony had begun in the case. Juror No. 7 informed the court that she forgot to say in voir dire that she had been inappropriately touched as a child. She told the court that her

obtain the voir dire transcript, we cannot conclude that her performance fell below "prevailing professional norms." (*Strickland, supra*, 466 U.S. at p. 688.)

3. *Substantial Evidence, Independent Review, and Analysis*

We have independently and thoroughly examined the whole record before us, as well as appellant's written contentions. Applying the standard set forth by the California Supreme Court in *People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054, we conclude from our examination that substantial evidence supports the jury's verdicts in this case. Further, we find that appellate counsel has fully complied with her responsibilities, and like counsel, we have found no arguable issues. (See *Smith v. Robbins* (2000) 528 U.S. 259, 276, 280, 283-285; *People v. Kelly* (2006) 40 Cal.4th 106, 119, 123-125.)

DISPOSITION

The judgment is affirmed.

MOHR, J.*

We concur:

FLIER, ACTING P.J. BIGELOW, J.

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experience would not affect her and she would keep an open mind. Counsel made no objection and Juror No. 7 continued to serve.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.